

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MITCHELL J. MILLER
Claimant

VS.

GENERAL MOTORS CORPORATION
Self-Insured Respondent

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Docket Nos. **1,048,350 &
1,048,351**

ORDER

The self-insured respondent requests review of the February 22, 2012, Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on September 11, 2012.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for the claimant. Carla Fields Johnson of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In Docket No. 1,048,350, the SALJ found claimant sustained a 20% permanent whole body functional impairment followed by a 90% work disability for his December 2, 2008, accidental injury. The SALJ denied benefits in Docket No. 1,048,351 because he found claimant's injury of October 28, 2009, was a natural and probable consequence of the original 2008 injury.

Respondent requested Board review in both docketed claims. In its application for review, respondent claimed the SALJ erred in calculating the compensation due and owing to claimant. Respondent maintained claimant's employment had been reinstated and he returned to work on December 5, 2011, which was between the date the case was submitted and the date of the award.

Claimant initially argued the SALJ's award should be affirmed. However, claimant thereafter raised an issue regarding whether claimant was entitled to additional work disability benefits for periods of time in which claimant was receiving neither earnings nor

temporary total disability benefits (TTD). In response to the new issue raised by claimant, respondent argues the Board should dismiss the review because the issue respondent raised in the application for review has been addressed by the SALJ on review and modification of the original award.

The issues before the Board for review are:

- (1) Is the issue raised by claimant properly before the Board for review?
- (2) Did the SALJ err in not awarding claimant additional work disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The SALJ entered Awards in both docketed claims on February 22, 2012.

In Docket No. 1,048,350, the SALJ found claimant sustained a 20% permanent functional impairment to the whole body followed by a 90% work disability commencing on October 27, 2011. The calculation in the award included 21.72 weeks of TTD plus 81.66 weeks of permanent partial disability benefits (PPD) for the 20% functional impairment followed by additional PPD based on a 90% work disability.

The SALJ denied benefits in Docket No. 1,048,351 for claimant's October 28, 2009, injury because that injury was a natural and probable consequence of the original injury of December 2, 2008.

An application for review was filed by respondent on March 7, 2012. In the application respondent raised this issue: "[c]alculation of the amount due and owing as of the date of Award. Claimant returned to work for Respondent on December 5, 2011."¹ Claimant did not file an application for Board review.

On March 8, 2012, the Board sent to counsel for the parties a briefing schedule and notice of hearing scheduling oral argument for June 5, 2012.

On April 6, 2012, the Board received respondent's brief, which was limited to the calculation issue raised in its application for review.

Respondent filed an application for review and modification in both claims on April 11, 2012.

¹ Application for Review filed March 7, 2012.

On April 26, 2012, the Board received correspondence from claimant's counsel requesting the SALJ's Award be affirmed because it was supported by the evidence in the record. Claimant further asserted that the application for review and modification was the appropriate procedural mechanism to resolve the issue raised by respondent.

On June 5, 2012, the SALJ conducted a hearing on respondent's application for review and modification. The basis for respondent's review and modification application was that claimant had returned to work for respondent on December 5, 2011, and therefore claimant's work disability benefits should be terminated as of that date. The following exchange occurred at the review and modification hearing:

MR. WALLACE: Your Honor, I would be willing to stipulate that Mr. Miller did, in fact, return to work December 5th, 2011, and from that date forward or subsequent to that date, he would not be entitled to work disability, as long as he was employed earning a comparable wage. However, I -- the other issues, which I understand will be taken care of on direct appeal, would not be involved with the Court at this time.

THE COURT: Okay. So the only issue I'm looking at here is this time period of October 27th to December 5th as being owed for work disability and that's the only issue I need to address?

MR. WALLACE: That is correct, Your Honor.

MS. FIELDS-JOHNSON: Yes, Your Honor.

THE COURT: So I don't touch anything that's going on in the appeal. I don't know all of that.

MR. WALLACE: That is correct. The only thing you need to address is that one period where he was terminated and then his return to work in December and his entitlement to benefits subsequent thereto, which I've stipulated to.²

Judge Shelor issued a Review and Modification Award on July 11, 2012. The SALJ found:

It is determined claimant has returned to work for the employer at a comparable rate of compensation and therefore is no longer eligible for benefits regarding a work disability effective December 5, 2011.³

No application for Board review of the Review and Modification Award was filed.

² R.M.H. Trans. at 4-5.

³ R & M Award at 4.

On July 17, 2012, claimant filed with the Board a “Motion To Reopen Briefing.” In that motion, claimant requested the Board to reestablish briefing schedules to allow the parties to address the issue of whether claimant was entitled to additional weeks of work disability during those periods when claimant was neither receiving TTD nor salary.

On July 18, 2012, Marcelle Shrake, a legal assistant with Board, forwarded an e-mail to both attorneys of record. The e-mail was in response to claimant’s Motion To Reopen Briefing. The e-mail stated: “A new briefing schedule will be established once and [sic] Application for Review has been filed on the Review & Modification Award entered by SALJ Shelor on July 11, 2012.”

On August 23, 2012, claimant filed a “Supplemental Submission Letter” that restated and elaborated on the issue raised in claimant’s Motion To Reopen Briefing. In his August 23, 2012, letter claimant’s attorney stated that the issue he raised regarding additional weeks of work disability was raised before the SALJ at the June 5, 2012, review and modification hearing, however, the Administrative Law Judge declined to rule on these issues.⁴

On August 30, 2012, respondent filed a pleading entitled “Suggestions In Opposition Of Claimant’s Motion To Reopen Briefing.” Also on August 31, 2012, respondent filed a Motion to Dismiss Appeal.

In its “Suggestions in Opposition of Claimant’s Motion to Reopen Briefing,” respondent maintained “[c]laimant lost the right to raise errors to that Award 10 days following the Award’s effective date pursuant to KSA 44-551(i)(1).” Respondent requested that “[c]laimant’s Motion to Reopen Briefing and consideration of Claimant’s Supplemental Submission Letter should be denied.” Respondent argues that the only issue on appeal was resolved and, therefore respondent’s appeal should be dismissed.

In his Supplemental Submission Letter claimant asserts neither TTD nor salary were paid during a number of time periods, all before the date claimant’s employment with respondent was terminated on October 27, 2011. The periods total 48.71 weeks and claimant now argues he should be awarded work disability benefits during those 48.71 weeks.

K.S.A 2008 Supp. 44-555c mandates that the Board’s consideration be on issues presented to the ALJ. Issues not raised before the ALJ cannot be raised for the first time on appeal.⁵ This section of the Act states in part:

⁴ Claimant’s Supplemental Submission Brief at 1 (filed Aug. 23, 2012).

⁵ See *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. **The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.** (Emphasis added).

In other words, the Board generally will not address issues raised for the first time on appeal.⁶

Essentially, claimant argues he is entitled to 48.71 weeks of additional PPD. However, the record does not support the notion that this specific issue was raised before the SALJ. There is no reference to the issue at the May 24, 2011, regular hearing, nor in claimant's submission letter to the SALJ. Claimant filed no application for Board review of the February 22, 2012, Award. The issue was not raised at the June 5, 2012, hearing on respondent's application for review and modification. Claimant's counsel advised that the Award should affirmed in his letter dated April 26, 2012.

Under the circumstances, the Board finds claimant waived this issue. The Board declines to address the issue claimant is now presenting because it was not raised before the SALJ.

Moreover, the only way claimant could obtain additional weeks of work disability benefits would be to establish a work disability higher than that found in the SALJ's Award. Under the version of K.S.A. 44-510e in effect when claimant was injured, work disability is determined by averaging claimant's post-injury task loss and wage loss. Claimant makes no contention that claimant's work disability or impairment of function have increased making additional PPD appropriate. Claimant's position on the merits of the issue he raises would fail even if claimant had raised the specific issue below and had not waived the issue.

Claimant relies on the Board's decision in *Ratcliff*.⁷ However, the facts in *Ratcliff* and those in this claim are substantially different. In *Ratcliff*, claimant settled a claim on an open award basis. He thereafter filed an application to review and modify the award on the basis his wage loss increased following a separate injury, to a different part of the body, which resulted in claimant's inability to work. The Board ruled that the award was subject to review and modification by claimant even if claimant was being paid TTD for the second injury. Clearly, the circumstances in *Ratcliff* are distinguishable from those in the current claim and provide no support for claimant's position even if the Board reviewed the merits of claimant's position.

⁶ *Tackett v. ABM Industries, Inc.*, No. 1,052,155, 2012 WL 5461461 (Kan. WCAB Oct. 1, 2012).

⁷ *Ratcliff v. Par Electrical Contractors, Inc.*, 1,050,846, 2012 WL 1142961 (Kan. WCAB Mar. 22, 2012)

The Board therefore finds the issue raised by claimant is not properly before the Board and will not be reviewed. The Board also finds the Award entered by SALJ Jerry Shelor dated February 22, 2012, is affirmed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board finds the issue raised by claimant is not properly before the Board and will not be reviewed. The Board further finds that the Award of the SALJ is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
cpb@mrwallaw.com
Carla Fields Johnson, Attorney for Respondent
cfields@fieldsandbrown.com
Jerry Shelor, SALJ
Kenneth J. Hursh, ALJ

⁸ K.S.A. 2008 Supp. 44-555c(k).